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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

O. L. DAILEY, JR., ROY FINCH, JR., AND JAMES C. DAVIS ..... *Petitioners*

v.

UNITED STATES OF AMERICA ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Little Rock, Arkansas

PARAGON PRINTING CO., LITTLE ROCK

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UNITED STATES OF AMERICA ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners pray that writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals, Eighth Circuit, entered in the above entitled case on January 12, 1961.

CITATIONS TO OPINIONS BELOW

The judgment and the opinion rendered thereon dated and entered Jan. 12, 1961, by the United States Court of Appeals for the Eighth Circuit is as yet unreported and is recopied and attached hereto as Appendix A.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 12, 1961. Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether a district court has the authority to inquire into the propriety in a removal proceeding of the charges of an indictment alleged to have been predicated upon incompetent or no evidence before the Grand Jury of the demanding state, and whether the district court has authority at the instant of an accused to require production of the Grand Jury minutes of the demanding state prior to the issuance of warrants for removal, and whether Fed. Rules, Cr. Proc. Rule 40 (b) (3) violates procedural due process. U. S. Const. Art. 3, §2, cl 3, Amends. V and VI.

U. S. Const. Art. 3 §V cl 3

U. S. Const. Amend. V

U. S. Const. Amend. VI

Fed. Rules. Cr. Proc. Rule 40 (b) (3) 18 U.S.C.

Copies of the same are listed and attached as Appendix "B" hereto.

STATEMENT

On October 24, 1960, the petitioners were indicted by a Federal Grand Jury sitting at Fargo, North Dakota. The indictment alleges 33 counts of mail fraud in violation of 18 U.S.C.A. §1341. The petitioners were arrested and posted bond on November 14, 1960. On December 2, 1960, the petitioners requested the Arkansas District Court to inquire into the propriety of the North Dakota proceeding, alleging among other things, that the indict-

ment was based upon false or incompetent testimony, and requested the Court to order production of the Grand Jury minutes prior to issuing warrants for their removal. Simultaneously the respondent sought the warrants for removal which was resisted by the petitioners. The Arkansas District Court denied the motion of the petitioners and granted the motion of the respondent. An appeal to the Eighth Circuit Court was timely filed, and on January 12, 1961, a *per curiam* order was issued dismissing the appeal in *toto*, which order upheld the validity of Fed. Rules, Cr. Proc. Rule 40 (b) (3), 18 U.S.C. against a contention of unconstitutionality. The Court of Appeals disallowed the petitioners herein to submit written briefs in support of their contention, but summarily dismissed the appeal. The Appeals Court did, however, stay the order of the District Court granting the warrants for removal until January 20, 1961, with a proviso that in the event a petition for a writ of *certiorari* was filed with this Court, evidenced by a certificate of the Clerk of this Court that the mandate of the Court of Appeals staying the removal warrants would be extended until such time as this Court should make an ultimate disposition of the matter. The North Dakota District Court has ordered the petitioners to appear for arraignment January 24, 1961.

Unless the petition for writ of certiorari is granted, the petitioners must appear in North Dakota notwithstanding that they feel grave constitutional questions are presented herein.

REASONS FOR GRANTING THE WRIT

1. During the Arkansas District Court hearing, the respondent made absolutely no effort whatever to deny in any respect the allegations that no competent evidence whatsoever was introduced before the North Dakota

Grand Jury against the petitioners. Moreover, the respondent has estimated that the North Dakota trial will last approximately three months. The petitioners are without funds to adequately and properly defend themselves against the untrue charges against them. Thus, the current relief sought by this petition is the last opportunity for the petitioners to present and pursue this matter, which, without a review by this Court, would amount to a denial of their right to equal protection and procedural due process. Fed. Rules, Cr. Proc. Rule 40, 18 U.S.C. provides that when a defendant is arrested in a distant district, he cannot be removed to the demanding district until an order of removal has been filed by the Court. Paragraph 3 of the rule provides that the defendant may cross-examine witnesses and introduce evidence in his own behalf if he does not waive hearing. It is the respondent's contention that the District Court has no authority whatever to examine into the propriety of warrants, but that upon the presentation of a certified copy of the indictment and evidence of the accused's identity, the court becomes a "rubber stamp" and the removal warrants are granted without discretion. In *U. S. v. Parker*, 14 F.R.D. 146, the District Court of the District of Columbia in refusing to order the removal of one accused of certain violations occurring in Illinois, stated:

> "Rule 40 (b) (3) provides in part, 'If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment.' While the sentence is mandatory in terms, however, it does not destroy but only limits the exercise of discretion by the Court. The purpose in requiring that the judge must issue the order of removal was to make it a judicial, rather than a mere ministerial, act, so as to afford defendant reasonable protection. *Tinsley v. Treat*, 1907, 205 U. S. 20, 27 S. Ct.

430, 51 L. Ed. 689; *Beavers* v. *Henkel*, 1904, 194 U. S. 73, 24 S. Ct. 605, 48 L. Ed. 882; *United States v. Chiarito*, D. C. Or., 1946, 60 F. Supp. 317. It follows that in removal proceedings, the Court is allowed some discretion, and may make inquiry whenever special facts are disclosed that seem to make questionable the propriety of removal. *United States* v. *Johnson*, D. C. Or., 1945, 63 F. Supp. 615."

In *U. S.* v. *Wright*, 15 F.R.D. 184, the United States District Court of Hawaii, in denying the application for a warrant of removal of the defendant to the District of Alaska, in reiterating that part of the opinion quoted in the *Parker* case, *supra*, found that the asylum court was allowed discretion in removal proceedings to make inquiry concerning the issuance of warrants of removal. Cited in the Parker and Wright cases as authority was *U. S.* v. *Johnson*, 63 F. Supp. 615, in which the court in denying the removal petition, stated:

"(1) We have always felt in this court that there was discretion, under the existing practice, allowed to us by the decisions on removal matters. The extent of the discretion may be arguable. But I know my practice has been to stop and make inquiry whenever special facts were disclosed that seemed to make questionable the propriety of removal, especially where such long distances were involved and the expense to the Government was great. But this case involves more than dollars and cents."

The opinion of the Arkansas District Court to the effect that he was without the authority to inquire into the propriety is in conflict with the foregoing decisions. The matter is of grave concern, not only to the petitioners but to all defendants similarly situated. The issue is important and will affect a great many cases in the

future and the decisions of the District Court and the Circuit Court seem clearly erroneous.

2. The Arkansas District Court, in declining to issue its order for the production of the North Dakota Grand Jury minutes, indicated he was without power to issue such an order even though the petitioners showed conclusively at the District Court removal hearing that they were not associated with the defendant company prior to March 4, 1960, and even though the indictment charged the petitioners with having been so associated prior thereto. The courts have consistently held that after an indictment has been found and the defendants apprehended, the veil of secrecy surrounding Grand Jury proceedings may be safely lifted where justice so requires. *Metzler* v. *United States*, 9 Cir., 64 F. 2d 203, 206; *United States* v. *Amazon Industrial Chemical Company*, D.C. Md., 55 Fed. 2d, 254, 261. Settlement of this question is clearly in the public interest and the production of Grand Jury minutes in questionable cases to prevent an injustice would, in many circumstances, compel the asylum court to demand their production upon a ligitamate request.

3. To require the petitioners to be placed to the trouble and expense of travelling across the continent and to attempt to pay the transportation costs of innumerable witnesses and indispensable evidence before a jury completely foreign to the petitioners' environment when concurrent jurisdiction exists in the petitioners' resident state; all records of the petitioners' activities, and conclusive evidence of their good faith throughout the operation of the questioned corporation, violates U. S. Const. Art. 3, §2, cl 3, Amends. V and VI.

In *Hyde* v. *Shine*, 25 S. Ct. 760, 199 U. S. 62, 50 L. Ed. 90, the Supreme Court in discussing removal proceedings, said:

"* * * But we do not wish to be understood as approving the practice of indicting citizens of distant states in the courts of this district, where an indictment will lie in the state of the domicile of such person, unless in exceptional cases where the circumstances seem to demand that this course shall be taken. To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship to which he ought not to be subjected, if the case can be tried in a court of his own jurisdiction."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRY E. MCDERMOTT, JR.

Counsel for Petitioners

Union Life Building

Little Rock, Arkansas

January 18, 1961

CERTIFICATE OF SERVICE

I, Harry E. McDermott, Jr., attorney for the petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 18th day of January, 1961, I served copies of the foregoing petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit, on the United States, by mailing a copy in a duly addressed envelope with air mail postage, prepaid, to William P. Rogers, esq., Attorney General of the United States, Department of Justice, Washington 25, D. C., and to the Solicitor General, Department of Justice, Washington 25, D. C., and to Osro Cobb, esq., United States District Attorney for the Eastern District of Arkansas, by mailing a copy in a duly addressed envelope, regular postage, to his office at Federal Building, Little Rock, Arkansas.

HARRY E. MCDERMOTT, JR.
Attorney at Law
Union Life Building

Counsel for Petitioners

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

APPENDIX A

C. L. Dailey, Jr., et al., *Appellants*		Appeal from the United States District Court for the Eastern District of Arkansas.
v.	No. 16661	
United States of America *Appellee.*		

On consideration of the motion of appellants for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari or to a Justice of the Supreme Court for a stay, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed to and including January 20, 1961, and if within said period there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, or that a stay has been granted, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

January 12, 1961.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 16,661.

O. L. Dailey, Jr., et al, Appellants,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[January 12, 1961.]

Before JOHNSEN, Chief Judge, and MATTHES, Circuit Judge.

PER CURIAM.

The three appellants here, who are residents of the Eastern District of Arkansas, and other defendants were charged by indictment in the District of North Dakota with having devised a scheme or artifice to defraud and having used the mails in attempts at executing it, in violation of 18 U.S.C., Section 1341. The indictment consisted of 33 counts, each alleging a distinct act of such mail use on the part of all defendants

The Government made application to the District Court for the Eastern District of Arkansas for a warrant of removal against appellants to the District of North Da-

kota. Appellants filed a motion to have the court grant them a hearing on and to have it make examination into whether probable cause had existed for the return of the indictment, and as an incident of such an inquiry to have the court require the Government to make available the minutes of the Grand Jury from the District of North Dakota for the court's inspection.

After a hearing on appellants' motion, the court refused to order the Government to make available the grand jury minutes and also refused otherwise to engage in any inquiry into the question of probable cause for the indictment. Thereafter, upon a production by the Government of a certified copy of the indictment and of proof sufficient on the record before us to establish that appellants were the persons named in the indictment, the court entered an order of removal against appellants. It stayed the operation of the order, however, for a limited period of time to enable appellants to take an appeal.

Upon the filing of a notice of appeal, a docketing of the case in this Court and the making of an application to us for a further stay of the removal order, we directed that the appeal be set down summarily for hearing on the merits. After such hearing, we on the same day dismissed the appeal as being frivolous, denied the application for a further stay of the court's removal order, and ordered the immediate issuance of mandate, with a reservation of the right to make subsequent filing of this Per Curiam in indication of the reasons for our action.

Rule 40(b)(3), Fed. Rules Cr. Proc., 18 U.S.C.A., contains different prescriptions as to the issuance of warrants of removal, depending on whether the prosecution rests on an information or complaint or on an indictment. "If the prosecution is by information or complaint, a warrant

of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged." In the case of an indictment, however, the rule provides: "If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment."

Hence, no right legally to a hearing on probable cause in a removal proceeding as to a prosecution by indictment can be claimed to exist, unless such a hearing constitutes a matter of due process and the failure of Rule 40(b)(3) to make provision therefor thus violates the Fifth Amendment. But such a contention of implication of due process and deprivation thereof clearly would be frivolous under the declarations which have been made by the Supreme Court.

Long before the Federal Rules of Criminal Procedure were adopted, the Supreme Court had said: "Removal from one Federal District to another * * * is unlike extradition or interstate rendition, in that the protection owed by a sovereign to those within its territory is not involved. * * * There is no constitutional right to a hearing in advance of removal." *United States, ex rel. Kassin* v. *Mulligan*, 295 U.S. 396, 399, 400, 55 S.Ct. 781, 79 L.Ed. 1501. See also *United States, ex rel. Hughes* v. *Gault*, 271 U.S. 142, 149, 46 S.Ct. 459, 70 L.Ed. 875, and *Beavers* v. *Henkel*, 194 U.S. 73, 87, 24 S.Ct. 605, 48 L.Ed. 882, in which the statutory provisions existing previous to the Rules of Criminal Procedure were involved.

The constitutionality of the provision in Rule 40(b)(3) here involved was expressly considered and upheld in

Binion v. *United States*, D.C. Nev., 13 F.R.D. 238, 241, 242; appeal declared frivolous, 9 Cir., 201 F.2d 498, 499; certiorari denied 345 U.S. 935, 73 S.Ct. 796, 97 L.Ed. 1363; rehearing denied 345 U.S. 961, 73 S.Ct. 937. Other cases have also specifically refused to examine the question of probable cause in any way in proceedings for removal as to a prosecution by indictment. *Singleton* v. *Bokkin*, D.C. D.C., 5 F.R.D. 173; *Hemans* v. *Matthews*, D.C. D.C. 6 F.R.D. 3, 4; *United States* v. *Bessie*, D.C. S.D. Cal., 75 F. Supp. 95; *United States* v. *Bishop*, D.C. Ore., 76 F.Supp. 866, 868. See also Holzoff, Removal of Defendants in Federal Criminal Procedure, 4 F.R.D. 455, 468.

Appellants argue, however, that though the rule be constitutional, and that while the language of the rule is patently clear, there nonetheless is implicit under it a discretionary power and obligation in the District Court to hold a hearing on whether a particular removal involves circumstances of gross injustice or unfairness and to deny a removal on this basis. They contend that the present situation was of this nature, and that the court abused its discretion and obligation in refusing to make examination of it. *United States* v. *Parker*, D.C. D.C. 14 F.R.D. 146, and *United States* v. *Johnson*, D.C. Ore., 63 F.Supp. 615, are relied upon in support of this contention.

In the *Parker* case, the court regarded the application for a warrant of removal, at the particular time and in the immediate circumstances in which it was made, as constituting an undue personal harrassment and as thus amounting to an abuse of the removal process. The indictment had been returned more than four years previously. The removal defendant had appeared for trial eleven times in the district where the charge was pending, and each time the case had been continued. The Govern-

ment was not seeking to have him removed for the purpose of having him make answer to the charge or stand trial thereon but simply to subject him to a mental examination. The court said: "The end of removal is * * * prosecution. On the present record it appears defendant has not in anywise attempted to frustrate prosecution by dilatory tactics, but has been willing to appear for trial at all times. Indeed, he now asserts he is willing to appear for trial when one is assured. On the present record, this Court, being advised the prosecution even at this late date, four years after indictment, simply seeks to determine defendant's mental ability to stand trial without any assurance of early trial, and being of opinion that under these circumstances the defendant would be unduly harrassed, the application for warrant of removal will be denied." 14 F.R.D. at pages 147 and 148.

In the *Johnson* case, the court refused to issue a warrant for the removal of a defendant from Oregon to the District of Columbia to answer an indictment for the offense of nonsupport of his wife and children under the laws of the District of Columbia. The court said: "In the absence of any prior construction of this statute by the courts of the District of Columbia, I hold that the crime of nonsupport was not committed by this defendant in the District of Columbia between January 1 and July, 1945, as alleged in the indictment, because during none of that time was the defendant in the District of Columbia. And in so holding I claim the right, contrary to the rubber-stamp theory, to construe the statute and go behind the indictment and deal with the facts as they really are. * * *." 63 F. Supp. at page 618. It should be noted that this decision was prior to the effective date of the Federal Rules of Criminal Procedure.

But we need not decide whether, under Rule 40(b)(3), a court has the right to engage in any proceedings on a removal application, except to have a certified copy of the indictment produced before it and to have proof made that the defendant is the person named in the indictment. If any implicit right to engage in a further examination can be argued to exist, it cannot in any way be as to the matter of probable cause but at most simply a question of legal abuse of the removal process in itself.

This manifestly involves a most tenuous line, and the immediate situation cannot be argued to be within it. What appellants sought the opportunity to prove was that it was not possible for them to have had a part in the acts charged in 22 of the 33 counts of the indictment, because these acts had occurred before they had had "any association at all" with the corporations whose operations were involved. This merely related to the question of their innocence or guilt factually. Beyond this, and in any event, there still remained 11 counts in which the acts charged had occurred subsequent to appellants' association with the corporations.

In what we have said, we again emphasize that we intend no implication that a question of abuse of removal process in itself, lying outside the realm of probable cause as such, may perhaps be open to consideration in a removal proceeding. As we have stated, it is not necessary to consider that question, for it is not involved under the circumstances which were sought to be proved; and further, if the right to engage in such an examination could exist, its exercise would be a matter entirely for the trial court's discretion. The court could not be required to engage in it, we think, unless it saw fit. Again, as previously stated, no pure abuse of removal process

could be claimed to be present on the circumstances which appellants claimed, since there were in any event 11 counts that fall within the time when appellants admittedly were associated with the corporations.

The motion of appellants for a stay of the operation of the trial court's removal order is denied, and the appeal is dismissed as being frivolous.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

U. S. Const. Art. 3, §2, cl 3:

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

U. S. Const. Amend. V:

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.] — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

U. S. Const. Amend. VI:

[Rights of the accused.] — In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defene.

Fed. Rules. Cr. Proc. Rule 40 (b) (3), 18 U.S.C.

Hearing; Warrant of Removal or Discharge. The defendant shall not be called upon to plead. If the defendant waives hearing, the judge shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the commissioner or judge shall hear the evidence. If the commissioner hears the evidence he shall report his findings and recommendations to the judge. At the hearing the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offenses charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1961. The petition for a writ of certiorari was filed on January 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an order under Rule 40, F.R. Crim. P., for the removal of a prisoner from the district where arrested to the district where indicted is an appealable order.

2. Whether, in a removal proceeding, the District Court sitting in the district of arrest has authority to inquire into the competency of the evidence to support the indictment returned by a grand jury in another district and to order production of the grand jury minutes.

STATUTES AND RULE INVOLVED

Rule 40(b)(3) provides in pertinent part:

> * * * If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prose-

cution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

28 U.S.C. 2253 provides in pertinent part:

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

* * * *

STATEMENT

Petitioners and others were indicted by a grand jury in the United States District Court for North Dakota on 33 counts charging use of the mails in execution of a scheme to defraud. Petitioners were subsequently arrested in Arkansas, on November 14, 1960. Although not denying that they were the persons named in the indictment, they resisted removal on the ground that the North Dakota indictment was based on incompetent testimony. In particular, they argued that 22 of the 33 counts were based on mailings that occurred before they became associated with the corporations named in the indictment. They also

requested that the Arkansas court order production of the minutes of the North Dakota grand jury. The Arkansas court refused to undertake any inquiry into the facts underlying the indictment. Upon production of a certified copy of the indictment and of proof that petitioners were the persons named, the court entered an order of removal.

Petitioners noted an appeal to the Court of Appeals for the Eighth Circuit, which considered the merits of their contention (Pet. App. A) and thereafter dismissed the appeal as frivolous.

ARGUMENT

1. Petitioners have already received more consideration than was their due, since their appeal should have been dismissed for lack of jurisdiction. An order of removal is not a final order and is therefore not appealable under 28 U.S.C. 1291. *Meltzer* v. *United States*, 188 F. 2d 916 (C.A. 9), and cases there cited. Before 1938, orders of removal could be tested by filing a petition for a writ of habeas corpus and then appealing from the denial of the petition. In 1938, however, Congress enacted the provision (Act of June 29, 1938, c. 806, 52 Stat. 1232) now incorporated in 28 U.S.C. 2253, *supra*, declaring that there shall be no right of appeal in habeas corpus proceedings brought "to test the validity of a warrant to remove, to another district * * * a person charged with a criminal offense against the United States * * *."[1]

[1] If a court should act beyond its power, a remedy by mandamus would presumably be available.

2. The holding of the court below that the district court properly refused to inquire into the probable cause for the North Dakota indictment or to order production of the minutes of the North Dakota grand jury is clearly correct. Rule 40 specifically provides that, if the prosecution is by indictment, "a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment." The notes of the advisory committee explain the reason for making a distinction between the situation where removal is after indictment (so that production of the indictment is enough) and where removal is before indictment (where probable cause must be shown) as follows:

> * * * The distinction is based on the fact that in case of an indictment, the grand jury, which is an arm of the court, has already found probable cause. Since the action of the grand jury is not subject to review by a district judge in the district in which the grand jury sits, it seems illogical to permit such review collaterally in a removal proceeding by a judge in another district.